UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

THOMAS DOMONOSKE,
Individually and on behalf others similarly situated

Plaintiff

v.

Case No. 05:08-CV-00066
Hon. Samuel G. Wilson
Magistrate Judge: Michael F. Urbanski

BANK OF AMERICA, N.A.,

Defendant

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Introduction

A class action cannot be compromised or settled without the approval of the Court. Fed. R. Civ. P. 23(e). Prior to addressing the adequacy of a proposed settlement, however, the Court must determine whether the classes, as agreed to by the parties, may be certified for purposes of the settlement. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.E.2d 689 (1997).

Rule 23's flexible approach permits courts to conditionally or provisionally certify a class for purposes of effectuating a settlement of the case. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 793-794 (3rd Cir. 1995)(collecting cases and authority). A court may grant conditional approval of a class action where the class proposed satisfies the four prerequisites of Rule 23(a) (numerosity, commonality, typicality and adequacy), as well as one of the three subsections of Rule 23(b). *See Amchem*, 521 U.S. at 613;

see also *South Carolina National Bank v. Stone*, 749 F.Supp. 1419 (D.S.C. 1990). If the Court determines that a settlement class should be certified, the Court must then follow a three-step process prior to granting final approval of a proposed settlement. *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543 (S.D. Ohio 2000).

First, the Court must preliminarily approve the proposed settlement. *Id.* at 547. Second, members of the class must be given notice of the proposed settlement. *Id.* Third, a hearing must be held, after which the Court must decide whether the proposed settlement is fair, adequate, and reasonable to the class as a whole, and consistent with the public interest. *Id*. This protects the class members' procedural due process rights and enables the Court to fulfill its role as the guardian for the classes' interests. The decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *City Partnership Company v. Atlantic Acquisition L.P.*, 100 F.3d 1041, 1043-44 (1st Cir. 1996).

For the following reasons, the parties request that the Court certify a settlement class, preliminarily approve the terms of the settlement and begin the three-step process for granting final approval.

I. Description of The Litigation and the Proposed Settlement

Mr. Domonoske brought this case as a class action and alleged that he was a member of a class of persons whose rights under the Federal Fair Credit Reporting Act, ("FCRA") 15 U.S.C. §1681, *et seq*. were violated by the Bank of America. A description of the legal claims, the parties' positions, the agreed facts, and the proposed settlement follows:

A. Legal Basis for the Claims

The claims at issue arise under 15 U.S.C. § 1681g(g) of the FCRA. Since 2004, the

FCRA has required mortgage users of credit scores to provide a notice of the use along with a copy of the score that has been used. The statute requires that notice will be provided "as soon as reasonably practicable." 15 U.S.C. § 1681g(g). Users of credit scores in conjunction with mortgage loan applications – like Bank of America – must include the credit score used, the name of the agency that provided the score, and the statutory notice of rights. The user of the credit score must then provide the notice to the consumer as soon as is reasonably practicable.

While the parties have disagreed as to whether Bank of America's practices comply with the FCRA, the parties agree that the FCRA itself provides the only binding authority under which the Court may evaluate Mr. Domonoske's claim.

1. Evidence of Bank of America's efforts to ensure compliance with the provisions of 15 U.S.C. § 1681g(g).[a]

Congress enacted FACTA in 2003 and included several provisions concerning the use of credit scores. Prior to § 1681g's effective date of December 1, 2004, Bank of America asserts that it mobilized a compliance effort which was subject to its highest level of management discipline available to it for insuring bank-wide compliance. Bank of America's evidence reveals that it formed a team from various arms of its company with representation from groups including Legal, Compliance, Risk Management, Corporate Security, Technology, Operations, Quality, and Productivity. Each phase of Bank of America's process had specific tasks, goals, and next steps. Each new requirement by FACTA (including § 1681g(g)) was monitored and managed through this process to implement and enhance compliance across all of Bank of America's lines of business. Resources and personnel from each affected line of business contributed to the effort. Three major project teams were created for FACTA compliance, one of which related to the credit score disclosures under § 1681g(g). Throughout this process, several different workgroups held daily, weekly and monthly meetings relating to the disclosures. These efforts to comply with FACTA by its initial effective date were known collectively as Generation I.

After Bank of America completed its initial compliance plan in relation to the credit score disclosures, it launched a second generation compliance effort, Generation II, in order to further streamline its processes. Bank of America brought its vast resources to bear on assuring compliance, and spent millions of dollars to ascertain the compliance requirements and execute appropriate protocols for FACTA and the provisions of §1681g(g) in particular. Throughout its consideration of the protocols necessary to comply with FACTA's credit score disclosure obligations, and its subsequent testing and streamlining of those protocols, Bank of America involved both in-house and outside counsel. At every stage, counsel reviewed and approved of the Bank's protocols as compliant with, among other things, the "soon as reasonably practicable" standard of § 1681g(g).

2. Facts Concerning Bank of America's Processes in Relation to the Class Claims

Throughout the class period, when a consumer applied for a real estate loan with Bank of America, the application was moved from an application system to a fulfillment platform, a software system owned and operated by the Bank for the purposes of obtaining required applicant information and making a decision on each application. Home equity applications primarily used a platform known as ACAPS. The Bank also used other platforms which are collectively known as the Legacy Bank of America platforms, the majority of which have been phased out since the filing of this case.

For purposes of the credit score disclosures required by § 1681g(g), Bank of America established a process for delivery of those notices, one for Legacy Bank of America systems, and one for the ACAPS system.

a. The ACAPS Process.

i. When an home equity loan application was received by Bank of America on the ACAPS system, ACAPS automatically requested a credit score;

ii. When the transaction was closed, it was then entered as "booked" on the ACAPS system, and ACAPS automatically triggered a request for preparation of the credit score disclosures required by § 1681g(g);

iii. Within 24 hours of such a request, the credit score disclosure was prepared by populating a form disclosure letter with the consumer-specific information for the particular transaction;

iv. The populated form disclosures letter was then instantaneously placed on ACAPS as an electronic "TIFF" image so as to facilitate its printing and then sent to a group within the bank known as Document Fulfillment Services; and

v. Document Fulfillment Services printed the disclosures, placed it in an envelope, and mailed it to the consumer, usually within two days of receipt.

b. The Legacy Bank of America Process

vi. When a mortgage application was received by the Bank and entered onto a Legacy Bank of America platform, a credit score was then automatically obtained. Once a credit score was obtained, the platforms automatically triggered a credit score disclosure for those applications requiring a disclosure under § 1681g(g);

vii. Every Thursday, the platforms conducted an electronic sweep of applications pending on their systems at least a week to collect the necessary information form all those transactions where a credit score disclosure had been requested;

viii. The extracted data was then sent to the Data Transmission Services, a group within Bank of America, for encryption and submission as a batch file to a third-party vendor;

ix. The vendor received the batch file each Friday morning, extracted the data from the batch file, and used it to populate the fields of the form disclosure letter provided by the Bank; and

x. The vendor then printed and mailed those letters the following Monday, Tuesday, or Wednesday to each applicant for whom data was received.

3. Respective positions of the Parties.

a. Mr. Domonoske

Mr. Domonoske maintains that these processes are unreasonable on their face. In the case of the ACAPS system, Bank of America's processes were intentionally designed to withhold the notice until loan applications were concluded either by being "booked" or terminated. In Mr. Domonoske's case, that program design caused his disclosures to be withheld in excess of a month. In any event, neither of these triggers internal to Bank of America’s systems have any relation to the underlying test under the Fair Credit Reporting Act which requires the notices be sent “as soon as is reasonably practicable”. Because Bank of America had all the information necessary and the ability to send the notices sooner that it did, Domonoske argues that the law required the notices to be sent sooner.

As to the Legacy Bank of America Platforms, Mr. Domonoske maintains that those processes were specifically designed to withhold notices for the purpose of batch processing and bulk mailing, which in under normal circumstances could be a delay in delivery between 5 and 12 days after use.

Based upon information concerning the preparation of other notices, Bank of America possessed the system-wide capability of producing these notices immediately upon use as it did with other notices that were in fact generated by Bank of America.

b. Bank of America

Bank of America maintained throughout the litigation that its systems were designed to, and in fact did comply with the mandates of the FCRA. Bank of America argued that the FCRA does not set stringent time frames for the preparation and delivery of the credit score notice, but rather allows them to be sent when "reasonably" practicable. Bank of America claimed that this flexible standard provided large lenders with the discretion to prepare and send the notices in a commercially reasonable fashion that accounted for the convenient and efficient delivery of these notices. In this case, Bank of America maintained that the processes were designed to accommodate large-scale mailings which could most reasonably be accomplished through batch processing and bulk mailing, all of which were reasonably effected by its systems.

4. Description of the Litigation to Date and Discovery

Mr. Domonoske filed his case on August 8, 2008. In the year since filing, the litigation to date has involved the exchange of almost 10,000 pages of documents, the deposition of April Stoner, a subpoena to a third party vendor of Bank of America, the deposition of Mr. Domonoske, and the deposition of Bank of America through its Rule 30(b)(6) designee, Marty Smith. That discovery exchange has been marked by motion practice at virtually every turn. Ultimately, the conclusion of the class discovery phase of the case concluded with the agreement by Bank of America to the prevalence of the practice at issue which effectively resolved any dispute as to numerosity of the claims and the agreement by Bank of America as to the prevalence of the practice at issue. Based upon the discovery and stipulation, Mr. Domonoske concluded that the case was suitable for class treatment and submitted his contested motion for certification of a class of consumers who had applied for home equity lines of credit.

In addition to engaging in discovery, the parties also engaged in extensive settlement negotiations. These arms-length discussions were initially conducted by the parties before an experienced mediator, retired Magistrate Judge Edward J. Infante of JAMS. Those mediation sessions included two in person sessions in San Francisco along with follow up discussions by phone with the mediator present and countless discussions between counsel. Ultimately, based on the progress made before the mediator, the parties were able to conclude their negotiations in the private sessions. Following a status conference in late August, the parties entered into a settlement agreement (attached hereto as Exhibit A) and the plaintiff filed his Motion, to which Bank of America has agreed to join, seeking certification of a settlement class and preliminary approval of the terms of the settlement agreement.

5. Description of the Proposed Settlement

The proposed settlement in this case includes provisions for a lump sum payment by

Bank of America following notice to the proposed class members. The proposed settlement provides the following essential terms:

> The Class will include two subclasses as follows:
>
> **ACAPS Class**. All natural persons who applied to Bank of America for a loan subject to 15 U.S.C. § 1681g(g) whose loan application was processed on the ACAPS platform between August 8, 2006 and September 12, 2008, where the Credit Score Disclosure was triggered more than three days after receipt of the application.
>
> **Legacy Bank of America Class**. All natural persons who applied to Bank of America for a loan subject to 15 U.S.C. § 1681g(g) whose loan application was processed and booked on the Legacy Bank of America platforms between May 28, 2006 and July 11, 2009.
>
> The Class will receive a gross recovery of $9,950,000.00 plus costs of administration.
>
> The net class recovery will be paid on a per loan transaction basis. For each loan transaction in which Bank of America used a credit score [during the class period], the class member will be entitled to share in the recovery.
>
> Class notice and disbursements will be handled by a reputable class action claims administrator, Rust Consulting.
>
> Bank of America will pay all costs associated with administration and notification of the class including identification and location of class members, mailing of notice, and preparation and delivery of disbursement checks.
>
> Prior to mailing notice, the class list will be scrubbed by Bank of America to identify those persons with whom it has current, verifiable address information and those who have recently paid off their mortgages. For those individuals for whom there is no current address on file, the Class administrator will run an inquiry with Lexis/Nexis for current addresses which will be verified using the National Change Of Address database. All mailing and address scrubbing will occur at Bank of America's expense, outside any recovery to the class. Notice will then be given to the class members by fourth class mail.
>
> Class Counsel will establish a web site for the purpose of promulgating the notice and accepting claims.

Class members will be required to complete a claims form which will be provided. Class members will also be permitted to submit claims online at no cost using a PIN number.

Class members will receive their proportionate share of the claims fund to a maximum of $100.00 based upon the number of claims that are received by the Class Administrator. The class notice will estimate the likely recovery per class member using the best available data from the claims administrator based upon comparable settlements.

All disbursement checks will be subject to a 60 day expiration after which time, any unclaimed funds will be held in a *cy pres* trust.

The balance of the *cy pres* trust will be disbursed to the Center for Responsible Lending for use in programs of its choosing to assist Bank of America consumers faced with foreclosure or seeking housing following a foreclosure, so long as they are not used for litigation.

The Class Representatives, Mr. Domonoske and Mr. Rivera will receive reimbursement of their expenses incurred on behalf of the class along with an incentive award of $5,000 each.

Bank of America agrees to not oppose any fee by Plaintiff's counsel up to 25% of the first $9,400,000 of the class recovery (i.e., to a maximum of $2,350,000).

The Class members will only release legal claims arising from the violation of 15 U.S.C. § 1681g(g) or comparable state law.

The settlement agreement and notice prove provide the ability of class members to opt out, along with clear instructions for anyone wishing to do so.

Bank of America may withdraw from the settlement if more than 5% of the class members opt out.

Bank of America agrees to an injunction assuring future compliance with the FCRA, attached as Exhibit D to the settlement agreement.

These provisions of the settlement agreement assure future compliance by Bank of America, distribute significant relief among the class members, provide for customary attorney's fees and costs, and establish a beneficial use of the unclaimed funds without reversion to the Defendant. This settlement is facially sound and reasonable in light of the allegations and defenses.

II. Requirements to Certification of a Proposed Settlement Class

Federal Rule of Civil Procedure 23(a) requires that in order for a class action to proceed it must be shown that:

> (1) The class is so numerous that joinder of all members is impracticable; (2) There are questions of law or fact common to the class; (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and, (4) The representative parties will fairly and adequately protect the interest of the class.

Rule 23(b) authorizes certification if the four prerequisites of Rule 23(a) are met, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Eisen v. Carlisle Jacquelin*, 417 U.S. 156 (1974). District courts are to conduct a "rigorous analysis" into whether the requirements of Rule 23 are met before certifying a class. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). The policy in this Circuit is "to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for affected parties and . . . promote judicial efficiency." *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989) (internal quotation marks omitted).

1. ***Numerosity*: the proposed settlement class is so numerous that there is no practical means of joining the class members to this action.**

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." See, e.g., *Talbott v. GC Servs. Ltd. P'ship*, 191 F.R.D. 99, 102 (W.D. Va. 2000). In this context, "[i]mpracticable does not mean impossible." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). "When the class is large, numbers alone are dispositive . . . ." *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986). There is no set minimum number of potential class members that fulfills the numerosity requirement. See *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984) (citing *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978)). See also, e.g., *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 595 F. Supp. 1404, 1407 08 (D. Md. 1984) (stating that "[a] class consisting of as few as 25 to 30 members raises the presumption that joinder would be impractical"). The court may rely on reasonable estimates of the number of class members. *Haywood*, supra. at 576-77. See also *Kernan v. Holiday Universal, Inc.*, 1990 WL 289505, *2 (D.Md.1990) (citing *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir.1989)).

At this time, the Plaintiff has determined that the class consists of approximately 3.5 million individuals, whose delivery of credit scores and notices are alleged by Plaintiff to have been delayed by Bank of America. The sheer size and scope of this nationwide class is sufficiently large to compel the conclusion that numerosity does lie, and that joinder of these far-flung individuals is impracticable. There is no practicable means of joining these individuals to this action.

2. *Commonality*: There are common questions of law and fact which render this case suitable for class treatment.

Next, Federal Rule of Civil Procedure 23(a)(2) requires that there be at least one common question of law or fact to the members of the class. *Jeffreys v. Commc'ns Workers*, 212 F.R.D. 320, 322 (E.D. Va. 2003); *Cent. Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992). Not all factual or legal questions raised in the litigation need be common so long as at least one issue is common to all class members. *McGlothlin v. Connors*, 142 F.R.D. 626 (W.D. Va. 1992). Commonality is a liberal standard. The fact that there are some factual variances in individual grievances among class members does not preclude a finding of commonality. *Jeffreys*, 212 F.R.D. at 322. Not all factual or legal questions raised in the litigation need be common, so long as at least one issue is common to all class members. See *id*. A court may find commonality where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated. *American Fin. Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D.Md.1974)). The commonality requirement dictates that the class present significant questions which will advance the progress of the case. See *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990). The typicality and commonality requirements ensure that only those plaintiffs who can advance comparable factual and legal arguments will be included in the class. *Broussard*, 155 F.3d at 340; *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 212 (E.D. Va. 2003).

Here, the proposed settlement class consists of those individuals who Plaintiffs alleged were not timely sent a copy of their credit score and notice under 15 U.S.C. § 1681g(g) by Bank of America following the use of that credit score in connection with a mortgage transaction. Each of these class members share a common claim under 15 U.S.C. § 1681g(g) arising out of a common policy and procedure by Bank of America in the preparation of delivery of the required information under the FCRA. Given the nature of the policy and claims, class members share overarching questions of both law and fact in relation to the class claim, questions with clearly propel this litigation forward to a resolution. As such, the commonality prong of Rule 23 is satisfied.

3. ***Typicality*: Claims of the class representative are typical of those of the class members.**

Federal Rule of Civil Procedure 23(a)(3) requires that a named plaintiff's claims be typical of those borne by the class. While similar to the commonality requirement which examine the claims of the class, the typicality requirement focuses on the named plaintiff's claim. *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 64 (M.D.N.C.2008) (citing *Broussard v. Meineke Discount Muffler Shops, Inc.*, supra at 340. The named plaintiff's “interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members.” *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir.2006). The Fourth Circuit has restated this requirements: "[A]s goes the claim of the named plaintiff, so go the claims of the class." *Broussard*, 155 F.3d at 340 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)). The typicality requirement is met when class representatives show that: (1) "their interests are squarely aligned with the interests of the class members;" and (2) "their claims arise from the same events or course of conduct and are premised on the same legal theories as the claims of the class members." *Fisher*, 217 F.R.D. at 217 (E.D. Va. 2003) (citing *Jeffreys*, 212 F.R.D. at 322); *Morris*, 223 F.R.D. at 295.

In this case, Mr. Domonoske and Mr. Rivera bring a single claim under the FCRA. That claim rests on precisely the same legal and factual foundations as those of the class which they seek to represent. There are no significant legal or factual differences between his claim and that of the of the proposed class members. All claims arise from the same policies and procedures of Bank of America. Consequently, Mr. Domonoske's and Mr. Rivera's claims are typical of the class claim and this requirement of Rule 23 is satisfied.

4. ***Adequacy*: The Class representative and class counsel will adequately represent and protect the interests of the class members.**

The final component of Rule 23(a) requires that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The underlying premise of a class action is that litigation by representative parties adjudicates the rights of all class members, and therefore, basic due process requires that the named plaintiff possess undivided loyalties to absent class members. *Broussard*, 155 F.3d at 338 (citing inter alia *In re Gen. Motors Corp. Pick Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785, 796 (3d Cir. 1995)). This prerequisite is met when "(1) the named plaintiff has interests common with, and not antagonistic to, the Class' interests; and (2) the plaintiff's attorney is qualified, experienced and generally able to conduct the litigation." *In re S.E. Hotel Props. Ltd. P'ship Investor Litig.*, 151 F.R.D. 597, 606-07 (W.D.N.C. 1993). Accord, *Olvera-Morales v. Intern. Labor Mgmt Corp.*, 246 F.R.D. 250, 258 (M.D.N.C.2007) (characterizing factors as "vigorous prosecution" and "common interest")

a. Plaintiff has vigorously prosecuted this case through adequate class counsel.

The first prong of the adequacy test requires that the proposed class representative engage counsel that are "qualified, experienced, and generally able to conduct the proposed litigation....' " *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 721 (11th Cir.1987) (quoting *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir.1985)).

The current posture of this case demonstrates that proposed class counsel have litigated this matter vigorously to this point in the litigation. Thus far, the parties have engaged in extensive class discovery which advanced the case to a motion for class certification under facts which Plaintiffs believe would likely result in certification of this matter. Ultimately, based upon those facts adduced through that discovery process, Plaintiffs' counsel have successfully negotiated what would be one of the largest FCRA class recoveries ever to be certified for settlement. The litigation by Plaintiffs' counsel has been vigorous and has driven the case forward through the system to an ultimate resolution.

At the same time, the qualifications of class counsel are uniquely suited to the continued representation of the class. The declaration as to the qualifications of class counsel are attached and support this motion. A brief description of their qualifications to represent the class follow:

Mr. Lyngklip – is a former co-chair of the National Association of Consumer Advocates. He has litigated consumer class actions in Michigan and Nationally and obtained successful results in other class cases arising under the Truth In Lending Act, the Equal Credit Opportunity Act, and Fair Credit Reporting Act. He has received the recognition of his peer as one of the leading consumer advocates in the nation. Mr. Lyngklip is also a contributing author of Chapter 8 of the National Consumer Law Center's Fair Credit Reporting Act Manual concerning notices to be given under the FCRA. A declaration as to Mr. Lyngklip's qualifications is attached as Exhibit C.

Mr. Bennett – is a Partner in Consumer Litigation Associates, P.C. He is current member of the Board of Directors of the National Association of Consumer Advocates. He has litigated literally hundreds of cases within federal courts in Virginia and in numerous other jurisdictions across the Country. He is one of the most demanded CLE trainers in the country on the Fair Credit Reporting act and he has participated in a number of nation-wide FCRA class cases both in Virginia and California. A declaration as to Mr. Bennett's qualifications is attached as Exhibit D.

Mr. Cupp –

Mr. Cupp has been a member of the Virginia State Bar since 1983. He has litigated numerous cases involving various federal statutes, including cases resulting in published opinions. His practice includes the representation of consumers in state and federal courts under state and federal consumer protection statutes, including among others, the Truth in Lending Act, Magnuson-Moss Warranty Act, state usury laws, the Virginia Consumer Protection Act and Virginia's Payday Lending Act. Mr. Cupp also serves as counsel in an opt-in collective action currently proceeding in court under the Fair Labor Standards Act, in which he obtained an order from the court facilitating notice to a collective group of timeshare sales people and sales managers. A declaration as to Mr. Cupp's qualifications is attached as Exhibit E.

Mr. Erausquin – Mr. Erausquin is a partner in the Northern Virginia office of Consumer Litigation Associates, P.C., located in Virginia. He is licensed in Virginia and California and has litigated numerous consumer cases arising out of the FCRA and other provisions of the federal Consumer Credit Protection Act, in Virginia, California, Texas, Maryland and Hawaii. His past experience includes participation in numerous nation-wide FCRA and ECOA class cases, including three of the top five FCRA class settlements to date. A declaration as to Mr. Erausquin's qualifications is attached as Exhibit F.

This team of attorneys possesses an array of knowledge that is well suited to vigorously pursuing the interest of the class in a nation-wide settlement within this district. The strength of the settlement speaks for itself. As such, class counsel are adequate and this prong of the adequacy test has been satisfied.

b. The Class Representatives' interests are aligned with the class, and they have no interests that are adverse to the class.

The second prong of the adequacy test requires that the class representatives share common interests in the litigation. They "must possess the same interest and suffer the same injury shared by all members of the class [they] represent." *Schlesinger v. Reservists Comm. to*

Stop the War, 418 U.S. 208, 216 (1974). The fact that other class members may possess different or alternative claims for state law violations or claims for actual damages does not preclude a finding of adequacy where few such claims had been filed. *Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112, 1119 (4th Cir.1989). The fact that such claims could hypothetically be filed, likewise, does not defeat a finding of a common interest where there is no evidence of any significant number of such claims. *Clark v. Experian Information Solutions, Inc.*, No. Civ.A.8:00-1217-24, 2002 WL 2005709, at *3 (D.S.C.26 June 2002).

In this case, Mr. Domonoske's and Mr. Rivera's claims and the damages sought were identical to those of the proposed class. At the same time, the proposed settlement provides class members with the ability to "opt out" and thereby pursue any claims that they may have for actual, statutory, or punitive damages if they choose. Mr. Domonoske and Mr. Rivera have no interests which are antagonistic to the class and they are adequate representatives for purposes of resolving this class for settlement purposes. There is no potential for conflicting interests in this action.

5. The proposed settlement class meets the requirements for certification under Rule 23(b)(3).

Under Fed. R. Civ. P. 23(b)(3), an action that satisfies the threshold prerequisites for certification may be maintained as a class action if the court finds that: (1) "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members"; and (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The claims of the class representatives satisfy those requirements.

a. Predominance: The class issues predominate over issues which pertain to

only individual class members.

Rule 23(b)(3)'s predominance inquiry focuses on whether the proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362(4th Cir. 2004)(citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 142 (4th Cir. 2001). This criterion is normally satisfied when there is an essential common factual link between all class members and the defendants for which the law provides a remedy. *Talbott v. GC Servs., Ltd. Pshp.*, *supra*, 191 F.R.D. at 105 *citing Halverson v. Convenient FoodMart, Inc.*, 69 F.R.D. 331 (N.D. Ill. 1974).

Resolution of the common issues of fact and law in this case in a single proceeding will not only promote the efficient adjudication of these matters, under the terms of the proposed settlement that resolution will dispose of those issues entirely. In this case, the resolution of the class claims under § 1681g(g) require precisely the same proofs as would be needed in any individual claim and those common facts predominate over any individualized issues. In short, the fact that the common issues in this case are not merely significant, but pivotal to the resolution of the class members' individual claims. The common utilization of procedures and policies responsible for the violations alleged in this case compels a finding that the predominance requirement has been met here.

b. Superiority: The class mechanism is a superior method of resolving the claims of the millions of class members.

Finally, this Court must determine whether a class action is superior to other methods for the fair and efficient adjudication of this controversy under Fed. R. Civ. P. 23(b)(3). *Lienhart*, *supra* 255 F.3d at 147; *In re A.H. Robins*, 880 F.2d at 728. The factors to be considered here in determining the superiority of the class mechanism are (1) the interest in controlling individual prosecutions; (2) the existence of other related litigation; (3) the desirability of concentrating the litigation in one forum; and (4) manageability. *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 220 (D.Md.1997); *Newsome v. Up To Date Laundry, Inc.*, 219 F.R.D. 356, 365 (D. Md. 2004).

Efficiency is the primary focus in determining whether a class action is indeed superior. *Talbott*, 191 F.R.D. at 106 (citation omitted). In examining these factors, it is proper for a court to consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974). To determine superiority, courts also consider the anticipated amount of recovery for each plaintiff, noting that class actions are particularly appropriate where multiple lawsuits are infeasible because of the small amount of any individual remedy. See *Advisory Committee Note to 1996 Amendment to Rule 23*. In so doing, certification enables the court to manage a large number of small- and medium-sized claims when, as here, the costs of discovery and trial could easily prevent any individual adjudication of those claims, and thus preclude any relief to the class. See *Lozada v. Dale Baker Oldsmobile, Inc*., 197 F.R.D. at 321, 332-33 (W.D. Mich. 2000).

In this case, Bank of America's failure to timely deliver credit scores and notices to each class member give rise to a modest actual damage claim for the value of a credit score. The cost of that credit score to a consumer — should that consumer have chosen to purchase it for him or her own self – was $6.00 from Experian. See attached Exhibit B, Declaration of Pat Finneran. Ultimately, Bank of America's policies were designed to deliver those notices eventually, rather than deny them to the consumer entirely. In most cases those notices were delivered within 14 days of their use by Bank of America. Assuming that the delay in sending this notice would justify an award of the entire value of the score as valued by its retail sale price, few people – if any – would be motivated to sue to recover this $6.00. Thus, the only effective way of providing any relief at all to the members is via the class certification mechanism.

Any deprivation of this information and the notice would in almost all cases have resulted in little actual harm to the consumer. Given the small amount of the actual damages at issue, no individual claimant possesses any controlling interest in the litigation. Likewise, the absence of any competing classes, or other individual claims, suggests that absent certification here, it is unlikely that class members would obtain any form of relief. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344-45 (7th Cir. 1997). In short, unless this Court certifies this proposed settlement class, it is highly probable that class members will receive no relief of any kind. These facts establish that the class remedy is the superior – if not the only – means by which the class would obtain a remedy. To the extent that the class mechanism is likely the only real remedy for the class, this mechanism meets the superiority prong. This consumer class action is precisely the type of case most efficiently litigated through the class mechanism. The superiority criteria has been met, and the Court should certify the proposed settlement class.

III. The Court should preliminarily approve the terms of the settlement.

The principal underlying concern for the Court in reviewing a proposed class settlement is the protection of class members whose rights may not have received sufficient consideration in settlement negotiations. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir.1991). In determining whether to grant preliminary approval to the Class Settlement, this Court must make a preliminary determination as to the fairness, reasonableness, and adequacy of the settlement terms. Fed. R. Civ. P. 23(e)(2). *See Manual for Complex Litigation (Fourth)* ("MCL"), § 21.632 (4th ed. 2004). The Fourth Circuit has bifurcated the analysis into consideration of fairness of negotiations of the settlement and the adequacy of the consideration to the class. *Jiffy Lube, supra* at 158-59; see also *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.Supp. 1379, 1383-84 (D.Md.1983); *Beaulieu v. EQ Indus. Services, Inc.*, 2009 WL 2208131 (E.D.N.C.,2009). While the Court must assess the strength of plaintiffs' claims, it should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981)). Moreover, where a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair. *City P'ship Co. v. Atlantic Acquisition Ltd. P'Ship*, 100 F.3d 1041, 1043 (1st Cir. 1996); *Rolland v. Cellucci*, 191 F.R.D. 3, 6 (D. Mass 2000).

1. Fairness: The proposed settlement was the result of "arm's-length" negotiations under the supervision of an experienced class action mediator.

Factors relating to the fairness of a proposed settlement are: (1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue. *Jiffy Lube, supra* at 158-59. See also, *Horton,* supra at at 828.

a. Posture at Time of Settlement:

At the time of settlement, the parties had already engaged in the exchange of written discovery concerning class certification issues. As a part of that discovery, Mr. Domonoske was able to learn at the Rule 30(b)(6) deposition of Bank of America that it had acted uniformly in relation to its mortgage applicants. Those uniform actions were the result of policies and procedures which resulted in the manner and timing in which the credit score disclosures were ultimately provided to the class members. The discovery that was obtained was only disclosed after discovery practice before the Court concerning both the written discovery and deposition testimony. In addition to that discovery practice, the parties had engaged in substantial, and extensive mediation before retired Magistrate Judge Edward J. Infante. In sum, the settlement presently before the Court was the product of hard-fought litigation and could only have been achieved through the discovery afforded by the process. This settlement bears all the hallmarks of an arms-length agreement rendered by parties who have knowledge of the facts and the relative strengths and weaknesses of the opposing party's litigation position.

b. Extent of Discovery:

The discovery taken included the delivery of almost 10,000 pages of documents by Bank of America and the acquisition of Rule 30(b)(6) testimony from Bank of America's designees. The end result of that discovery was the revelation that Bank of America had acted uniformly in relation to its mortgage applicants in the preparation of the notices and credit scores required by 15 U.S.C. § 1681g(g). Together with discovery of the processes used, Plaintiffs understood the evidence that would determine liability in the case, both favorable and unfavorable. Thus, by the time the settlement was struck, further discovery would not have likely turned over additional evidence supporting liability that was unknown to the parties. As such, the settlement was reached with an understanding of the merits of the case and possible defenses by Bank of America.

c. Circumstances Surrounding Negotiation:

As set forth above, the settlement discussions were conducted before an experienced class action mediator. These negotiations occurred in person on two separate occasions in San Francisco and in a number of follow up conversations by the parties, both with and without the mediator. Those follow up negotiations ultimately produced a substantial improvement in the settlement for the class. These facts militate in favor of finding that the circumstances of settlement were fair.

d. Opinion of Counsel:

Counsel for Plaintiff endorse the settlement as fair and adequate under the circumstances. Courts recognize that the opinion of experienced and informed counsel in favor of settlement should be afforded substantial consideration. *See In re MicroStrategy Inc. Sec. Litig.*, 148 F. Supp.2d 654, 665 (E.D.Va. 2001); *Cotton v. Hinton*, F.2d 1326, 1330 (5th Cir. 1977); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981). In approving class settlements, courts have given great weight to the opinion and judgment of experienced counsel who have conducted arm's-length negotiations. *See Rolland*, 191 F.R.D. at 6; *Stewart v. Rubin*, 948 F. Supp. 1077, 1099 (D.D.C. 1996); *see also* 2 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 11.41, at 89-90 (4th ed. 2002).

After initial discovery and vigorous settlement negotiations, counsel for the parties have agreed to the proposed Class Settlement Agreement as a just and appropriate resolution of all claims. Class counsel recommend this settlement to the Court based upon their collective experience as federal court litigators and experienced class counsel. The Class Settlement Agreement is the product of extensive arm's-length negotiations by experienced counsel, which were undertaken in good faith after factual investigation, discovery, and legal analysis. Thus, the parties in this litigation and their counsel have the best information available to judge the strengths and weaknesses of the parties' claims and defenses, and the costs and benefits of continued litigation versus compromise. Armed with this detailed knowledge, the parties entered into earnest settlement negotiations and after months of continuous negotiations, the parties reached an agreement in principle, to settle the claims.

2. The Class Settlement Terms in Relation to the Strength of Plaintiffs' Claims Demonstrates that this Settlement is Fair, Adequate, and Reasonable.

In evaluating the proposed Class Settlement, the Court should also consider the strength of Plaintiffs' case on the merits balanced against the amount offered in the Class Settlement. *See M. Berensen Co., Inc.*, 671 F. Supp. at 823; *Plummer v. Chemical Bank*, 579 F. Supp. 1364, 1370, 1372-74 (S.D.N.Y. 1984). In this process, however, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re Nat'l Student Marketing Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974). In light of the fact that the class members will receive, at a very minimum, a substantial portion of the value of the credit score, and in that there are substantial risks involved in continued litigation, the settlement is more than reasonable.

An analysis of the adequacy of these terms, relevant factors to be considered may include: (1) the relative strength of the plaintiffs' case on the merits, (2) any difficulties of proof or strong defenses the plaintiffs would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation, (4) the solvency of the defendants and the probability of recovery on a litigated judgment, and (5) the degree of opposition to the proposed settlement, (6) the posture of the case at the time settlement was proposed, (7) the extent of discovery that had been conducted, (8) the circumstances surrounding the negotiations, and (9) the experience of counsel in the substantive area and class action litigation. See *In re Jiffy Lube*, 927 F.2d at 159; *Clark v. Experian Information Solutions, Inc.,* 2004 WL 256433 (D.S.C.,2004)

Liability on the FCRA claims in this case is anything but certain. While class counsel for Plaintiffs believe that Bank of America clearly failed to comply with the mandate of § 1681g(g), unlike other consumer protection statutes, the FCRA does not provide for strict liability. Rather, liability under the act only arises upon a finding of negligence or willful failure to comply. 15 U.S.C. §§ 1681n and 1681o. Moreover, unless there is a finding of a willful noncompliance, Domonoske and Rivera (and thus the class) must establish actual damages. Statutory and punitive damages are only available where there is a finding of a willful violation. As such, either the class must proceed on a uniform "actual damage" claim or it must proceed for statutory and punitive damages under the more challenging "willfulness" standard of §1681n.

Assuming that the Court did permit the certification of an "actual damage" class, those damages could only be awarded for a uniform harm, ascertainable on a class-wide basis. In this case, that harm represents the delay in delivery of the consumer's credit score and the required accompanying notice. While a jury could determine a value and award the class damages for this delay, it is likewise possible that a jury could find these damages to be *de minimus* . On the one hand, even a modest individual award could rapidly translate to an enormous class recovery. On the other hand, a *de minimus* award could result in virtually nothing for the class. At most, had the required notice been provided earlier, the class members would have been advised as to their score and rights earlier. One of the core disputes between the parties at this time is the method of valuing the earlier delivery of those notices. The only conceivable means of attaining an accurate value is either by agreement of the parties or by allowing the trier of fact to assess that value. Because the parties do not agree to that value, the only means remaining is the assignment of value by a jury, a valuation that is inherently fraught with uncertainty. As such, a settlement for a significant sum is preferable to the significant risk of non-recovery for the class.

Statutory and punitive damages are uncertain. Plaintiffs believe that the evidence adduced by the class representatives establishes that Bank of America violated the FCRA and the score disclosure provisions of § 1681g(g). At the same time, discovery also revealed that Bank of America devoted significant efforts towards compliance. Those efforts were undertaken on a systemic, multi departmental basis. Bank of America has maintained throughout the suit that it had no motivation for the failure. That is to say, the Bank argues that it did not purposely delay the preparation and delivery of the required information and notice in order to secure a business advantage in the transactions with the consumers. Simply put, with a potentially large statutory damage award hanging in the balance, it is possible a jury may accept this argument and be unwilling to hold Bank of America responsible for a willful violation of the act.

At the same time, there is no guiding case law under this provision of the FCRA. While Plaintiffs maintain that the violation is patent, current case law discussing the standard for willfulness reveals that the lack of guiding decisional law may impact the ability of Plaintiffs to recover under § 1681n. See generally, *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007). Given the unique nature of these claims as well as the defenses thereto, the parties believe that the terms of the settlement agreement are fair and, indeed, may represent a premium over what the class members would likely receive after trial and a lengthy appeal.

These factors present a legitimate possibility that the class could recover nothing on the merits of the case. At the same time, given the large exposure to Bank of America, there is every indication that in the absence of this settlement, the parties would be required to try the case on a class-wide basis. That trial would likely consume a large amount of attorney and judicial resources. At the same time, assuming that the Plaintiffs were successful in proving actual damages, it is highly unlikely that those damages could ever exceed the cost of the credit score to the consumer, currently valued at $6.00. The terms of the class settlement guarantee each claiming class member a substantive portion of this value, at a minimum, and possibly as much as $100.00

Although the parties have conducted some discovery, significant additional work would be necessary, if this case had proceeded to trial. A trial on the merits of this action would entail considerable expense and would not necessarily end the litigation, given the right of appeal. Avoiding such expense and potential delay will save both the parties and the Court significant time, money, and precious judicial resources, and is a further appropriate reason for the Court to approve preliminarily the Class Settlement Agreement. *See Slomovics. v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1996) (stating that where litigation is potentially lengthy and will result in great expense, settlement is in the best interest of the class members); *see also Weinberger v. Kendrick*, 798 F.2d 61, 73 (2d Cir. 1982) (noting the important justifications including reduction of litigation and litigation related expenses favoring the settlement of class action lawsuits.

If the Court grants preliminary approval, class members will receive notice explaining the terms of the Class Settlement Agreement and their right to object or opt-out. Those class members who believe that the case is valuable or who have actual damage claims can tender those claims on an individual basis. While the degree of opposition to the Class Settlement Agreement cannot be known with any certainty, the lack of any other competing classes or individual cases support the strength of the settlement and the likelihood that it will stand. For these reasons, the opinion of all counsel involved is that the terms of the settlement agreement represent a fair, reasonable, and adequate resolution of the claims alleged.

IV. Notice to the Class Members

1. The class notice is reasonable in form and content.

Reasonable notice must be provided to class members to allow them an opportunity to object to the proposed Settlement. *See, Durrett v. Housing Authority of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). Rule 23 (e) requires notice of a proposed settlement "in such manner as the court directs." In a settlement class maintained under Rule 23(b)(3), class notice must meet the requirements of both Federal Rules of Civil Procedure 23(c)(2) and 23(e). *See Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 324-25 (E.D.Pa. 1993). With respect to a class certified under subsection (b)(3), Rule 23(c)(2)(B) requires the following notice:

> In a class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. The Court must provide for individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
> (I) the nature of the action;
> (ii) the definition of the class certified;
> (iii) the class claims, issues, or defenses;
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
> (v) that the court will exclude from the class any member who requests exclusion;
> (vi) the time and manner for requesting exclusion; and
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The MANUAL sets forth several elements of the "proper" content of notice. If these requirements are met a notice satisfies F.R.C.P. 23(c)(2); F.R.C.P. 23(e); and due process, and binds all members of the class.

In this case, the proposed Notices clearly meet the requirements of Rule 23(c)(2) and 23(e), as they are in plain English and include: (1) the case caption; (2) a description of the class; (3) a description of the claims; (4) a description of the Settlement; (5) the names of counsel for the class; (6) a statement of the maximum amount of attorneys' fees that may be sought by Plaintiffs' Counsel; (7) the Fairness Hearing date; (8) a description of Class Members' opportunity to appear at the hearing; (9) a statement of the procedure and deadline for filing objections to the Settlement; (10) a statement of the procedure and deadline for filing requests for exclusion; (11) a statement of the consequences of exclusion; (12) a statement of the consequences of remaining in the Class; and (13) the manner in which to obtain further information. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450, 496 (D.N.J. 1997). *See also* M*ANUAL* § 30. 212 (Rule 23(e) notice designed to be only a summary of the litigation and settlement to appraise class members of the right and opportunity to inspect the complete settlement documents, papers and pleadings filed in the litigation);

Moreover, since each member of the class can be identified, actual notice by mail will be effectuated. Notice via mail and website publication are all avenues for notice that have been approved by various courts. *See, e.g., White v. NFL,* 822 F.Supp. at 1400 (notice by mail to identified class members and publication once in *USA Today* "clearly satisfy both Rule 23 and due process requirements"), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied,* 515 U.s. 1137 (1995); *Lake v. First Nationwide Bank,* 156 F.R.D. 615, 628 (E.D.Pa. 1994) (approving as reasonable notice by third class mail to identified class members and publication to times in the national edition of *USA Today*); *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (Notice by mail identified class members and publication in *USA Today*).

Together with the various scrubbing and address verification methods set forth in the proposed settlement, the attached notice and publication via the settlement website constitutes adequate notice to the class members, reasonably calculated to provide the class members with actual notice of their rights. As such, the Court should approve the notice.

CONCLUSION

The proposed class meets the requirements of Rule 23(a) as well as Rule 23(b)(3). Plaintiff Thomas Domonoske, and upon transfer of *Rivera* to this Court, Plaintiff Victor Rivera, respectfully request that the court certify a settlement class, preliminarily approve the terms of the settlement and order the proposed class notice to be mailed to the class members forthwith.

Respectfully Submitted
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Certificate of Service

I hereby certify that on September 30, 2009, I electronically filed the foregoing Memorandum and attached Exhibits with the Clerk of the Court and served this document on the following parties:

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Dated: September 30, 2009

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

THOMAS DOMONOSKE,
Individually and on behalf others similarly situated

Plaintiff

v.

Case No. 05:08-CV-00066
Hon. Samuel G. Wilson
Magistrate Judge: Michael F. Urbanski

BANK OF AMERICA, N.A.,

Defendant

INDEX OF EXHIBITS TO MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

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Proposed Injunction and
Proposed Final Order .... Exhibit A
Declaration of Pat Finneran .... Exhibit B
Declaration of Ian B. Lyngklip .... Exhibit C
Declaration of Leonard A. Bennett .... Exhibit D
Declaration of Timothy Cupp .... Exhibit E
Declaration of Matthew Erausquin .... Exhibit F